



STATE OF CONNECTICUT

OFFICE OF POLICY AND MANAGEMENT

TESTIMONY PRESENTED TO THE CONNECTICUT GENERAL ASSEMBLY PUBLIC HEALTH COMMITTEE MARCH 16, 2009

Gale Mattison
Executive Financial Officer, Office of Finance
Office of Policy and Management
450 Capitol Avenue
Hartford, CT

RAISED BILL NO. 1120

AN ACT IMPOSING A MORATORIUM ON THE REBIDDING OF PURCHASE OF SERVICE CONTRACTS PERTAINING TO THE DELIVERY OF HEALTH AND HUMAN SERVICES BY OR ON BEHALF OF STATE AGENCIES

Senator Harris, Representative Ritter, and distinguished members of the Public Health Committee, my name is Gale Mattison. I am the Executive Financial Officer of the Office of Finance, within the Office of Policy and Management (OPM). I thank you for the opportunity to speak to you today about Raised Bill No. 1120, *An Act Imposing A Moratorium on the Rebidding of Purchase of Service Contracts*.

OPM believes this bill is not in the best interests of the State or its clients. We oppose the bill and do not recommend passage.

Background

Statutory Authority

C.G.S. 4-70b requires the OPM Secretary to "establish uniform policies and procedures for obtaining, managing and evaluating the quality and cost effectiveness of human services purchased from private providers." Further, the OPM Secretary is to "ensure that all state agencies which purchase human services comply with such policies and procedures."

Based on its statutory authority, OPM has worked extensively with the State's health and human service agencies and representatives of the private provider community to develop standards for an open and transparent process for the purchase of services.

Competitive Procurement Requirement

Since March 2006, OPM has required the POS agencies to competitively procure their health and human services. This is in keeping with an opinion issued by the Attorney General's Office stating that there is no legal distinction between a personal service agreement (PSA) – which is another type of State contract – and a POS contract.¹ The AG's opinion further states that POS contracts, like PSAs, are subject to the competitive procurements provisions of C.G.S. Sections 4-212 to 4-219, inclusive. Before the AG's opinion, there was an historic pattern of repeatedly funding current POS providers, usually on an annual, non-competitive basis. (For your information, a copy of the AG's opinion is attached.)

The same State statutes also provide for exceptions to the competitive procurement requirement. If a POS agency does not wish to conduct a competitive procurement for a service, the agency can apply to the OPM Secretary for a waiver. Since 2006, the Secretary has made extensive use of his authority to waive the competitive procurement requirement. For example, over 40 percent of the POS requests approved by OPM in 2007 were for waivers from competitive procurement.

Procurement Planning Report to Legislature

In February 2008, pursuant to the requirements of Public Act 07-195,² OPM submitted a report to the legislature related to the competitive procurement of health and human services. The purpose of the report was to summarize the principles and policies for competitive procurement that OPM was developing in collaboration with State agencies and in consultation with the CT Nonprofit Human Services Cabinet. The principles and policies OPM outlined in the report provided the framework for State agencies to follow in developing their individual procurement plans.

Agency Procurement Plans

Since July 2008, OPM requires the State's health and human service agencies to submit individual procurement plans to OPM for approval. The current plans cover the three-year period through June 2011. A key component of each plan is the agency's procurement schedule. The schedule includes (1) a list of services that will be procured,

¹ Office of the Attorney General, *Formal Opinion No. 031* (November 9, 2005)

² Pursuant to Public Act 07-195, *An Act Concerning the State Purchase of Human Service Contracts for Health and Human Services*, OPM submitted a report to the legislature, entitled *Principles and Procedures for the Competitive Procurement of Human Services* (February 1, 2008).

by fiscal year, and (2) a list of services, with rationale, for any waivers from competitive procurement requested by the agency. Agencies may amend their schedules, but are required to obtain OPM approval for any changes. Agency implementation of approved plans is currently underway.

Current Situation

Release of Procurement Standards

One month ago, on February 17, OPM released an updated procurement manual for PSAs and POS contracts. The manual addresses the requirements that all executive branch agencies – including the State’s health and human service agencies – must follow when entering into PSAs or POS contracts. Whereas the manual established certain new administrative standards for the POS agencies, the competitive procurement requirement for POS was not new. This requirement has been in place since 2006 when the AG issued his opinion (as noted above).

OPM Allows Delay of Competitive Procurement Requirement

The release of the procurement manual was accompanied by a letter from OPM Secretary Genuario to the State’s health and human service commissioners. (See attached.) The letter explicitly stated the following:

(quote) In light of the current fiscal environment and the resulting constraints on both State agencies and the service providers, I am allowing a delay of the competitive procurement requirement for certain contracts. The delay is effective from February 17, 2009 until June 30, 2011. (unquote)

The Secretary’s letter went on to explain that the delay of the competitive procurement requirement applied to contracts that maintain the *status quo*. In other words, OPM is allowing agencies to renew any contract that maintains the status quo, without a competitive procurement. In this context, *status quo* means that the cost, term, or scope of the service remains unchanged. If the amount of funding for a service is increased, if the term is extended, or if an agency wishes to make any significant change to the scope of a service, an agency must conduct a competitive procurement for the service. The provisions of the delay are in effect through the end of the current planning period.

The delay of the competitive procurement requirement in no way prohibits a State agency from *voluntarily* conducting a competitive procurement. An agency may decide to do so for any existing service if an agency determines that it is necessary, appropriate, or otherwise in the best interests of the agency’s clients or the State.

So, while there is an *expectation* for POS agencies to competitively procure health and human services, the agencies have the *option* of requesting a waiver from competitive procurement from OPM. OPM has approved – and will continue to approve – waiver requests for certain services, under certain circumstances, including those described in the Secretary's letter.

Conclusion

To conclude, this legislation imposes a temporary moratorium on the rebidding of contracts between State agencies and private providers of health and human services. This moratorium would apply retroactively, across the board, to all contracts since July 1, 2008 through July 1, 2010. We do not believe that this moratorium, in substance and in timing, is in the best interests of the State or the clients we serve.

First, agencies were asked to look strategically at the current and future needs of their clients, and at their current service mix. They were asked to thoughtfully determine how best to provide services and to develop a schedule to procure these services over the next three years. The moratorium, as proposed in this bill, is unworkable. Agencies have already begun their procurement processes, or have completed them, in accordance with their approved schedules. To stop these activities now will only create chaos and confusion.

Second, the title of the proposed bill refers to the “rebidding” of POS contracts, which presumably includes all *current* or *existing* contracts. OPM is concerned that this language may be interpreted to include the bidding of *new* contracts as well. Such an interpretation would hamper the ability of agencies to meet any new, expanded, or otherwise modified service requirements of the State's clients going forward.

Finally, putting the moratorium in State statute is unnecessary. The OPM Secretary has already instituted a temporary delay for the competitive procurement that covers a more appropriate time period and is more sensitive to agency and client requirements. We believe agencies are in the best position to know their client needs and how best to meet these needs. If they wish to delay the procurement process, OPM has already provided them with the option of doing so.

Thank you.

Attachments

cc: Senator Dan DeBicella

Representative Janice Giegler

ATTACHMENT
Attorney General's Opinion
Attorney General, Richard Blumenthal
November 9, 2005

The Honorable Robert L. Genuario
Secretary
Office of Policy and Management
450 Capitol Avenue
Hartford, CT 06106-1308

Dear Secretary Genuario:

You have asked for my opinion as to whether there is a legal distinction between a Personal Service Agreement ("PSA") and a Purchase of Service Contract ("POS"). Specifically, you also ask the following questions:

1. What statutory provisions require that a PSA be reviewed by the Attorney General as to form;
2. What distinction exists that exempts a POS from said statutory requirements; and
3. What distinction exists, if any, that exempts a POS from the statutory requirement contained in Conn. Gen. Stat. §4-212, et seq.

In my opinion, there is no legal distinction between a PSA and a POS, even though the Office of Policy and Management ("OPM") may choose to establish certain administrative procedures treating these types of agreements differently; they are both valid vehicles for entering into binding State contracts. As discussed more fully below, the answers to your questions are as follows:

1. The Attorney General's authority to review PSA and POS contracts is contained within Conn. Gen. Stat. §3-125, which provides that the "Attorney General shall have general supervision over all legal matters in which the state is an interested party." Contracts are legal "matters" and the state is "an interested party" in all state contracts.
2. POS contracts are not exempt from review by this office.
3. POS contracts, like Purchase of Service Agreements, are subject to the competitive procurement provisions of Conn. Gen. Stat. § 4-212 et seq.

Discussion

Your question asking whether POS contracts, like PSA contracts, are subject to the competitive procurement provisions of Conn. Gen. Stat. § 4-212 et seq was already answered in an earlier Opinion of the Attorney General, see 2004 Conn. Op. Atty. Gen.

020 (2004) (attached for your convenience). This Office concluded in that Opinion that contracts between a state agency and a private entity for the provision of certain human services for the benefit of both the public (typically through a POS) and state agencies (typically through a PSA) are subject to the competitive procurement requirements of Conn. Gen. Stat. § 4-212 et seq. unless otherwise exempted by statute. As we stated in that opinion: "Questions have been raised as to whether Conn. Gen. Stat. § 4-212 applies to contracts for services to the public, or only to contracts for services provided directly to state agencies. An examination of the relevant statutes and their legislative history indicates that Conn. Gen. Stat. § 4-212 applies in both instances."

The authority for the Attorney General to review contracts is contained in Conn. Gen. Stat. §3-125, which gives the Attorney General "general supervision over all legal matters in which the state is an interested party. . . ." Contracts are legal documents that set forth the state's rights and obligations, and the state is "an interested party" in every one of its contracts. As such, they are subject to review by this Office as the Attorney General deems it to be appropriate. See *id.*, Op. Atty. Gen. 020 (2004). There is nothing unique about POS contracts that would suggest that they be treated differently from other state contracts or that they should be exempt from review by this Office.

In posing your question of whether there is a legal distinction between a PSA and a POS that exempts a POS from review by this office you reference an August 9, 2001 letter that I wrote to Department of Social Services Commissioner Patricia Wilson-Coker. That letter states that there is no specific statute requiring this Office to review every state contract. While there is no statutory requirement that this office review every state contract, Conn. Gen. Stat. §3-125 gives the Attorney General the specific discretionary authority to determine whether review of all or any particular contract is appropriate and advisable. In regard to the "managed care contracts for the State's Medicaid program," referenced in the August 9, 2001 letter, the Attorney General determined that this office would not review those particular contracts because they were not "consistent with the positions [this office had] taken in related litigation or in the best interests of Connecticut's citizens." Consequently, the statements made to Commissioner Wilson-Coker specifically related only to the 2001 Medicaid managed care contracts and did not relate to PSA or POS contracts generally.

I trust this letter provides you with the answers to your questions. If you need further information, please contact me.

Very truly yours,
RICHARD BLUMENTHAL

Source: <http://www.ct.gov/ag/cwp/view.asp?A=1770&Q=306482>

ATTACHMENT
Letter from OPM Secretary Robert L. Genuario
(Reproduction)
February 17, 2009

February 17, 2009

Karen Foley-Schain, *Children's Trust Fund*
J. Robert Galvin, M.D., M.P.H., *Department of Public Health*
Theresa C. Lantz, *Department of Correction*
Susan I. Hamilton, *Department of Children and Families*
Thomas A. Kirk, Jr., PhD, *Department of Mental Health and Addiction Services*
Peter H. O'Meara, *Department of Developmental Disabilities*
Michael P. Starkowski, *Department of Social Services*

Dear Commissioner:

I am pleased to inform you of the release of a new OPM policy manual, entitled "*Procurement Standards: For Personal Service Agreements and Purchase of Service Contracts.*" This manual, available on the OPM's website [at http://www.ct.gov/opm/fin/procurement_standards], supplants our earlier 2005 manual, entitled "*Personal Service Agreements: Standards and Procedures.*" The new manual addresses the requirements that State agencies must follow when entering into a Personal Service Agreement (PSA) or Purchase of Service (POS) contract.

Of particular note is the requirement that a state agency wishing to purchase health and human services from a private provider must abide by new standards for competitive procurement. The POS-specific portions of the manual are the latest in our continuing effort to establish uniform policies and procedures for the purchase of human services from private providers.

In light of the current fiscal environment and the resulting constraints on both state agencies and our private providers, I expect to waive the competitive procurement requirement for existing contracts (described below), provided I find that the contract price is consistent with the state's interest in maximizing the use of its resources. This procedure will be in effect from February 16, 2009 until June 30, 2011.

If an agency wishes to exercise its option for a waiver during the next two years, an agency will still be required to submit a waiver request through the online POS Request Website. This requirement is consistent with current policy.

During this period, an agency is not required to competitively procure an existing health or human service when maintaining the status quo. Any contract that maintains the status quo may be renewed without a competitive procurement. In this context, *status quo* means that the cost, term, or scope of the service remains unchanged. If the amount of funding for a service is significantly increased or decreased, if the term is extended, or if an agency wishes to make any major change to the scope of a service, an agency will need to conduct a competitive procurement for the service.

PLEASE NOTE: This policy in no way prohibits an agency from conducting a competitive procurement. An agency may decide to conduct a competitive procurement for an existing service, if an agency determines that it is necessary, appropriate, or otherwise in the best interests of the State.

At the conclusion of this deferral period, all POS contracts will be subject to the competitive procurement requirements specified in the manual. All POS services must be competitively procured not later than June 30, 2012, unless an agency has obtained a program waiver from OPM via an approved procurement plan. Please refer to the policy manual for more information about program waivers and procurement plans.

Thank you for your assistance in developing these procurement standards and for your continued support for our efforts to assure an open and transparent process for the purchase of human services from private providers. Any questions regarding the procurement standards, moratorium or interpretation of this policy should be directed to Gale Mattison, Executive Financial Officer.

Sincerely,

Robert L. Genuario
Secretary

Source:

http://www.ct.gov/opm/cwp/view.asp?a=2982&q=383012&opmNAV_GID=1806